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No. _____

In the
Supreme Court of the United States
October Term, 1999

L.A. DEVELOPMENT,

Petitioner

v.

CITY OF SHERWOOD,

Respondent

Petition For Writ of Certiorari
To the Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents the question of whether a local government is permitted, as a matter of law, to impose a condition on development approval that results in an unconstitutional exaction and then avail itself of the defense of estoppel to defeat a request to have the excessive exaction reimbursed. In other words, is it permissible for a local government, after violating an individual's constitutional rights, to rely on estoppel to defeat a claim which seeks redress from the unlawful action. This question has a direct bearing on the force and effect of this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

PARTIES TO THE PROCEEDING

The parties to this proceeding are as follows. Petitioner is L.A. DEVELOPMENT, a general partnership consisting of Louis J. Fasano and Arthur and Associates Real Estate, Inc.. Respondents are CITY OF SHERWOOD, a municipal corporation, and Jane Aamold, Bill Boyle, Barry Kennedy, Mark Cottle, and Mayor Walt Hitchcock.

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DECISIONS BELOW

The order of the Oregon Supreme Court denying review of the decision of the Oregon Court of Appeals is reproduced as Appendix (App. A). The decision of the Oregon Court of Appeals, 159 Or App 125 (1999) is reproduced as Appendix B. The Appellate Judgment of the Oregon Court of Appeals is reproduced as Appendix C.

JURISDICTION

The decision of the Oregon Supreme Court, denying review, was entered on July 6, 1999. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This inverse condemnation action for just compensation was brought in Washington County Circuit Court, State of Oregon. Petitioner developed two land projects in the City of Sherwood, Oregon. The first project, Kathy Park, having 46 lots, was developed in two phases. Petitioner received preliminary approval, with conditions, for both Kathy Park phases. One condition of approval required the installation of an on-site storm water detention system to serve all 46 lots. During construction of phase one, petitioner

installed and respondent approved the mandated on-site storm water detention system sufficient to serve all 46 lots. When petitioner requested final plat approval for the second phase of the development, petitioner was required to sign an addendum to its subdivision compliance agreement. That addendum required petitioner to pay the City for what the City referred to as petitioner's fair share of a regional storm water detention facility. The amount of its "fair share" was calculated by reference to the total number of lots in Kathy Park, even though half of them had already received final approval and been developed. The "fair share" charge was in addition to the on-site storm water detention system already determined by respondent to be sufficient to serve the entire project. Petitioner objected to the charge as being unfair and in violation of its understanding at the time it purchased the land from respondent, at the time of preliminary and final plat approvals, and after installation of the on-site system. If petitioner refused to comply with the addendum, it would have been denied the right to develop its second phase.

A second project, William Park, located adjacent to the Kathy Park project, received

final approval in February 1995. As a condition of approval, respondent required petitioner to dedicate land for a city park. Respondent indicated it would reimburse petitioner for the cost of constructing City mandated improvements to Roy and William Streets where those streets abutted the dedicated parkland. Respondent subsequently refused to reimburse petitioner for those improvements.

Before final approval of the developments, petitioner openly objected to several other conditions imposed and exactions demanded by respondent as being excessive and not reasonably related to the impacts of the projects on public facilities. Petitioner repeatedly informed respondent that the exactions were far in excess of what could legally be imposed. Respondent ignored those protests and imposed the conditions anyway. Rather than administratively appealing the decisions and losing its substantial investment as a result of delays caused by an appeal, petitioner proceeded with and completed the projects.

In January 1996, petitioner demanded refund of the excessive exactions of which it had complained. In May 1996, after having its demands refused, petitioner filed an inverse

condemnation claim. Petitioner did not seek reversal or modification of the development approval, but rather sought financial reimbursement for the excessive and unconstitutional exactions.

In response to petitioner's complaint, respondent raised the defense of estoppel, citing that petitioner had proceeded with development instead of appealing the contested conditions to the Land Use Board of Appeals.[1] Respondents also claimed petitioner had accepted benefits allegedly conferred on petitioner by the granting of development permits. On respondent's motion for summary judgment the circuit court granted and the Court of Appeals affirmed that petitioner, as a matter of law, was estopped to assert a claim for just compensation. The Oregon Supreme Court denied review.

Throughout the proceedings below, petitioner asserted that estoppel, as a matter

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[1] The Land Use Board of Appeals is an administrative hearings body consisting of 3 attorneys, appointed by the Governor of Oregon, with exclusive jurisdiction over appeals of land use decisions made by local governments. The Land Use Board of Appeals does not have jurisdiction over claims for just compensation. If a landowner claims to be entitled to financial compensation for a "taking," such claims must be pursued in circuit court. *Dunn v. City of Redmond*, 303 Or 201, 204, 735 P2d 609 (1987).

of law, cannot apply in this case because the City had unlawfully exacted more than that which was constitutionally permissible. Rather than focus on the City's unlawful actions in conditioning development approval, the Oregon courts chose to focus on petitioner's failure to stop its development and administratively appeal the excessive exactions.

REASONS FOR GRANTING REVIEW

Supreme Court Rule 10.1(c) lists among the considerations governing review on certiorari the circumstance when a state court has decided an important question of federal law that has not been, but should be settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of this Court. Those bases for review are present in this case.

This Petition should be granted because this case involves an important federal question and by their decision below, the Oregon Courts have redefined Constitutional takings jurisprudence and have set a precedence which infringes upon property rights protected by the Constitution and previously recognized by this Court. The

precedent established by the decisions below subjects land use applicants to government coercion and requires applicants to choose between their constitutionally protected rights and the fate of their business undertaking.

Petitioner LA Development brought this action against the City of Sherwood contending the City's imposition of exactions violated, in part, the 5th and 14th Amendments to the U.S. Constitution and this Court's "takings" jurisprudence. Exactions imposed as a condition to receiving a development permit can result in a regulatory talking in violation of the Fifth Amendment. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994)[2]; *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In defense, the City claimed petitioner was estopped from

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[2] *Dolan* deals with the question of when and whether a condition of development that affects a property interest in certain ways, and that a governmental body attaches to a developmental approval, constitutes a "taking." To avoid being one, the condition must have an "essential nexus" to a legitimate governmental interest and must be related in its nature and extent to the impacts of the development. The test that *Dolan* establishes for that relationship is one of "rough proportionality" between the condition and the developmental impacts.

asserting its claim for just compensation. Petitioner countered, that as a matter of law, the City could not avail itself of the defense of estoppel because of the City's unclean hands.

Petitioner does not dispute that one can be estopped from asserting constitutional rights. That is not the issue in this case. The issue presented to this Court is whether the local government can effectively steal petitioner's money and property, violate the Constitution, and then hide behind the defense of estoppel to defeat a claim for just compensation.

While it is well established law that one can be estopped from asserting a constitutional rights violation, it is equally well established law that the equitable defense of estoppel is not available to a party who does not have the requisite clean hands. Equitable defenses cannot be used to successfully avoid the requirements of legislation and public policy enacted for the public protection. *See Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 257, *reh den* 323 U.S. 811 (1945). "The doctrine of estoppel is for the protection of innocent persons, and only the innocent may invoke it." *Meyers v. Moody*, 693 F.2d 1196, 1208 (1982);

31 C.J.S. § 89. Equitable defenses, including the doctrine of estoppel, can never be asserted to uphold an injustice or wrong of any character. *Crotty v. Union Mut. L. Ins. Co.*, 144 U.S. 621 (1892); *Daniels v. Tearney*, 102 U.S. 415, 420 (1880). Estoppel is to be applied against wrongdoers, not victims of a wrong. *Roberts v. Roberts*, 185 P2d 381, 387 (Cal.App. 1947). Equity will not enable a person to make a profit that could not otherwise be obtained by estopping another from asserting a legal right. *Herring v. Volume Merchandise, Inc.*, 113 SE2d 814, 816 (NC 1960). A person may not assert estoppel for the purpose of making effective, obtaining the benefit, or shielding him/herself from the results of their own violation of law, derelict of duty, inequitable conduct or wrongful act. *Meyers, supra;* 31 C.J.S. §89. As the United States Court of Appeals for the District of Columbia stated:

> "The doctrine of constitutional estoppel ... has its limits. The government may not interpose the doctrine as a defense if a party wishes to challenge an unconstitutional condition which is imposed on the receipt of federal funds." *Robertson v. Federal Election Commission*, 310 U.S. App. D.C. 185, 45 F.3d 486 (1995)(*citing Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 456-57 (1988).

In the case at bar, petitioners challenged respondent's imposition of unconstitutional conditions. Respondent took from petitioner that which it was not entitled to. Respondent is the wrongdoer, and petitioner a victim of a wrong. The Oregon Courts' decisions perpetuate an injustice and reward a government for violating petitioner's federal constitutionally protected rights.

A Washington Court of Appeals case denied the application of the estoppel defense in a case very similar to the one at bar. In *Castle Homes & Development v. Brier City*, 882 P2d 1172 (Wash.App. Div. 1 1994), a developer entered into a voluntary agreement to pay impact fees associated with a development. Later, the developer sought a rebate of fees imposed claiming the impact fees were not directly related to the impact of the development. The Court in *Castle Homes* ruled that when impact fees are properly assessed, the developer would be estopped to assert a claim, however, "when exacted without limitation to the direct impact, they are not appropriate and are in derogation of the law." *Id.* at 1179. The court then denied application of the estoppel defense stating:

> "The doctrine of estoppel is available to innocent parties only. ... Here, like in *Henderson Homes*, the City does not have the requisite clean hands...." *Id.*

In the case at bar, it was the unlawful actions of respondent that gave rise to this litigation. Respondents did not act innocently and did not have the requisite clean hands. They should not be permitted to raise the shield of estoppel to defeat petitioner's claims for just compensation.

Permitting the Oregon Courts' decisions to stand will have a profound effect on subsequent takings claims and litigation and go far beyond the facts or parties of this case. Affirming the City's actions will dilute the force and effect of this Court's decision in *Dolan*.

Following the reasoning in the case at bar, local governments are allowed to hold developers hostage by forcing them to involuntarily accept unconstitutional exactions. When faced with an excessive exaction, an applicant for a discretionary land use permit has the option of either accepting the unlawful condition or ceasing development operations to immediately challenge the exaction. The later choice often results in the loss of their business.

As in this case, most developers, especially smaller ones, will choose to involuntarily accept the unconstitutional conditions of approval rather than lose their businesses and forfeit their substantial financial investments. In effect, a local government can force applicants to choose between bankruptcy or surrendering their constitutional rights. Since the lesser of two evils is to forgo financial ruin, the decision allows local governments to impose excessive exactions without fear of retribution.

In light of the Oregon Courts' decisions, it is of great importance to the citizens of the United States that this Court grant this Petition, and reconfirm the meaning of and protections it established in *Dolan*. Without intervention, local governments will be permitted to raise the shield of estoppel to prevent claims for just compensation arising out of their unconstitutional actions. An otherwise obvious violation of the Fifth Amendment should not be immune from constitutional scrutiny merely by being attached as a condition of approval which a developer is forced to accept. Such a result could not be what this Court intended or anticipated when it protected land use

applicants from government overreaching in *Dolan*.

CONCLUSION

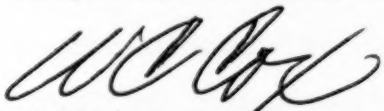
The decisions of the Oregon Courts infringe upon and dilute the constitutional protections this Court has established through its takings jurisprudence. The purpose of the United States Constitutions "Takings Clause" is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be born by the public as a whole." *Nollan, supra* 483 U.S. at 835-36 n.4. The decisions of the courts below frustrate this purpose.

The decisions below reward the efforts of a local government to avoid 5th Amendment requirements. The decisions permit respondent to take petitioner's private property without paying just compensation. The protections afforded by the 5th Amendment are being stripped of their force and effect.

Property owners, building interests, and others who are subjected to excessive conditions of approval have closely watched this case. Petitioner respectfully urges this Court to grant this Petition for Writ of Certiorari.

DATED this 1st day of October 1999.

Respectfully Submitted,



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Appendix A

IN THE SUPREME COURT OF THE STATE OF OREGON

L.A. DEVELOPMENT, a general Partnership consisting of Louis J. Fasano and Arthur and Associates Real Estate, Inc.	)	Washington County Circuit Court No.
Plaintiff-Appellant, Petitioner on Review,	)	C960575CV
v.	)	SC S46359 CA A100395
CITY OF SHERWOOD, a municipal Corporation, JANE AAMOLD, BILL BOYLE, BARRY KENNEDY, MARK COTTLE, and MAYOR WALT HITCHCOCK,	)	ORDER DENYING REVIEW
Defendants-Respondents, Respondents on Review.	)	

This Court has considered the petition for review and ORDERS that is be denied.

Dated this 6th day of July 1999.

/s/ W. Michael Gillette
W. MICHAEL GILLETTE
PRESIDING JUDGE

c: William C. Cox
Timothy J. Sercombe

Appendix B

FILED: March 17, 1999

IN THE COURT OF APPEALS OF THE STATE OF OREGON

L.A. DEVELOPMENT, a general partnership consisting of Louis J. Fasano and Arthur and Associates Real Estate, Inc.,

Appellant,

v.

CITY OF SHERWOOD, a municipal corporation, Jane Aamold, Bill Boyle, Barry Kennedy, Mark Cottle and Mayor Walt Hitchcock,

Respondents.

(C960475CV; CA A100395)

Appeal from the Circuit Court, Washington County

Jon B. Lund, Judge

Argued and Submitted Nov. 25, 1998.

William C. Cox argued the cause for appellant. With him on the briefs was Gary P. Shepherd

Timothy J. Sercombe argued the cause for respondents. With him on the briefs was Preston Gates & Ellis LLP.

Before Edmonds, Presiding Judge, and Armstrong, Judge, and Warren, Senior Judge.

EDMUNDS, P.J.

After completion of planned unit development, developer sued city, alleging city's development charges and fair share assessments constituted a taking and violated equal protection. The Circuit Court, Washington County, Jon B. Lund, J., granted summary judgment for city, based on estoppel defense. Developer appealed. The Court of Appeals, Edmonds, J., held that developer was estopped from challenging city's charges and assessments, as developer had reaped the benefit of gaining city's approval for the development by choosing not to pursue its remedy of appealing the charges and assessments within 21 days of project approval.

Affirmed.

ZONING AND PLANNING

Developer was estopped from challenging city's development charges and fair share assessments for a planned unit development four years after completion of the development, as developer had reaped the benefit of gaining city's approval for the development by choosing not to pursue its remedy of appealing the imposition of the charges and assessments to the Land Use Board of Appeals (LUBA) within 21 days of city's project approval. ORS 197.825, 197.830.

Plaintiff appeals from the dismissal of its complaint for damages resulting from the trial court's grant of defendants' summary judgment motion. ORCP 47. We affirm because plaintiff is estopped from claiming damages as a matter of law.

Plaintiff developed two land projects in the City of Sherwood. The initial subdivision received approval from the planning commission in two phases: Kathy Park I in November 1991 and Kathy Park II in November 1992. The final "planned unit development," William Park, received preliminary approval through the adoption of an ordinance by the city council in April 1994 and final approval from the city planning commission in February 1995. In January 1996, plaintiff sent a letter to the city demanding refund of "excess system development charges and 'fair share' assessments" paid for the projects. In May 1996, plaintiff filed a complaint in circuit court contesting the constitutionality of the conditions imposed on it by defendants (FN1) in approving the developments. By that time, the projects had been completed and were occupied.

In its complaint, plaintiff does not seek reversal or modification of the project approvals. Rather, it claims damages for the

cost of complying with the conditions under the theories that the conditions amounted to:

> "(1) [the] taking of private property without just compensation in violation of the Oregon Constitution, Article I, section 18, and the Fifth Amendment of the U.S. Constitution, made applicable to the states through the Fourteenth Amendment; (2)[a] violation of [plaintiff's] Fourteenth Amendment Equal Protection rights granted by the U.S. Constitution; (3)[a] violation of [plaintiff's] privileges and immunities granted by the Oregon Constitution, Article I, Section 20; [and] (4)[a] violation of [plaintiff's] USC § 1983 civil rights for the violation of [plaintiff's] Fifth Amendment and Fourteenth Amendment rights * * *." (Footnotes omitted.)

Defendants raise the affirmative defense of estoppel.

We review the factual record in the light most favorable to plaintiff, the non-moving party in the summary judgment proceeding. *Jones v. General Motors Corp.*, 325 Or. 404, 420, 939 P.2d 608 (1997). Plaintiff's actions are uncontested. Plaintiff expressed displeasure with many, if not all, of the conditions before final approval of the developments and did not at any time concede to the city the legality of the imposed conditions. Before final approval of the

William Park project, plaintiff consulted an attorney and considered the possibility of contesting the conditions or bringing a suit against the city after approval occurred. Plaintiff's representative, Lou Fasano, acknowledged in an affidavit that he signed the documents agreeing to the conditions, but he expressed to others that he did so "under duress." (FN2) Fasano explained in his deposition that he entered into agreements with the city regarding the conditions for William Park because they had reached a point where,

> " * * * just let's sign it and get out of here, or you reach a disagreement here and you sign it, because it's all been done.
>
> "Now, in the negotiations as a hostage, this is the best you can do. Then you move from there to whatever is available to you next, whether it's LUBA or whatever. There was no reason to make an objection at signing this.
>
> "This was at a point where we had made a decision to go forward with the project, as marginal as it was, because we didn't have many alternatives. If we don't go forward with this project, we fold our business.
>
> "This is a 41-lot--William Park is a 41-lot subdivision. That's the biggest project we had ever done. That's a two-

> year project for a two-man firm. If it doesn't go, we're out of business. We're dead. We have nothing to sustain us for the next two years. So if you can at all make this thing work somehow, you do. That's where we were at this point."

The claim of estoppel arises because plaintiff had a right to appeal the imposition of the conditions to the Land Use Board of Appeals (LUBA) within 21 days of receiving the notice of final approval for the projects. See ORS 197.825; ORS 197.830. In addition to that clearly available avenue of redress that plaintiff could have pursued, we also assume, for sake of discussion, that circuit court remedies might have been available at the same time or become available to plaintiff along the way. See 197.825(3); *Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 196, 935 P.2d 411 (1997). Be that as it may, the time that some recognized remedy could have been pursued to challenge or to avoid the conditions for which plaintiff now seeks damages came and passed approximately four years ago. Throughout the period from 1991 through 1995, plaintiff disregarded those remedies, completed the developments in compliance with the conditions imposed by the city and sold lots in the developments. Plaintiff admits the city constructed a

regional storm water facility and put in a well within the Kathy Park project. In addition, it is uncontroverted that the lots were sold with right of way and easement dedications that had been part of the conditions of approval. Also, Fasano admits that plaintiff made a profit on the sales. The issue is whether, in light of these facts, plaintiff is estopped from claiming damages for the costs of complying with the conditions.

In *Nelson v. City of Lake Oswego*, 126 Or.App. 416, 869 P.2d 350 (1994), we affirmed the right of landowners challenging requirements imposed by a city in connection with a building permit to raise inverse condemnation claims with the circuit court rather than appealing administratively. We distinguished the facts in Nelson from the facts in *Fifth Avenue Corp. v. Washington Co.*, 282 Or. 591, 581 P.2d 50 (1978), *and Suess Builders v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982). The Oregon Supreme Court held in those cases that, where administrative procedures exist for amending zoning plans, those procedures for seeking relief must be pursued rather than seeking relief from a court of law. *Suess Builders*, 294 Or. at 261, 656 P.2d 306; *Fifth Ave.*, 282 Or. at 622, 581

P.2d 50. We explained in *Nelson* that, where a claim is based on a development condition that results in the actual acquisition of a private property interest by the government, rather than a speculative "taking" based on a zoning plan, the failure to exhaust administrative remedies is not a bar to litigation. 126 Or.App. at 420, 869 P.2d 350. However, this case presents an issue that differs from the issue of whether plaintiff was required to exhaust its remedies by direct review before it could bring a claim for damages. Unlike in Nelson, the city raises the issue of its reliance on plaintiff's failure to pursue its other remedies and plaintiff's use of the benefits that accrued from plaintiff's compliance with the city's conditions.

There is controlling precedent on the issue of estoppel by the acceptance of benefits derived from governmental action. In *State v. Jutstrom Fish Co.*, 149 Or. 362, 39 P.2d 355 (1934), the state sought payment of a poundage tax on fish as required by statute. The defendant, *Jutstrom Fish Company*, had executed a bond guaranteeing payment of the tax in order to obtain a wholesale dealer's license. After receiving the license, the defendant operated as a wholesale fish dealer for at least two years but failed to pay the

poundage tax. In response to the state's complaint seeking to collect the tax, the defendant claimed that the statute providing for the tax was unconstitutional and void on its face. The court did not reach the merits of that claim:

> "The defendants are not in a position to assert that the statute imposing a poundage tax on fish purchased or received, regardless of where they were caught or taken, is unconstitutional. The statute was known to them when the bond was executed. In other words, the state was induced to issue a license to the Jutstrom Fish Co. by reason of the bond guaranteeing payment of the poundage tax, and both principal and surety are estopped to assert its invalidity. As stated in *United States v. Hodson*, 10 Wall. 395, 19 L.Ed. 937, *and cited with approval in Daniels v. Tearney*, 102 U.S. 415, 26 L.Ed. 187:
>
> " 'When a bond is voluntarily entered into and the principal enjoys the benefits it was intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense.' " 149 Or. at 367, 39 P.2d 355.

The holding in *Warren Construction Co. v. Grant*, 137 Or. 410, 299 P. 686, 2 P.2d 1118 (1931), also supports the city's argument. Grant and the other defendants sought to enjoin Warren and the highway commission from

building a certain portion of highway in Polk county. A trial court granted Grant's (FN3) motion for a restraining order enjoining Warren from proceeding on the construction work, contingent on Grant executing a bond from which damages would be paid to Warren if the injunction was later found to be wrongful. Grant executed the bond and Warren was forced to close down its rock crushing and paving plant for the project. The injunction was ultimately dissolved. Two years later, Warren sued Grant for damages stemming from the imposition of the injunction. In their answer, Grant denied the existence of the injunction and that Warren had been damaged. The court held that Grant, "having accomplished their purpose and obtained an advantage by the order, even if irregularly issued, should now be estopped from denying the efficacy thereof or liability for damages directly caused by their own acts." *Warren,* 137 Or. at 416, 299 P. 686.

Here, plaintiff had legal remedies available, chose not to pursue them and, as a result, reaped benefits by not pursuing those remedies. Under similar circumstances, private parties have been held estopped in their transactions when they have failed to avail themselves of potential remedies and as

a result, received benefits. For instance, in *Kittleson v. Tennant Agency,* 242 Or. 610, 411 P.2d 94 (1966), when a holder of a note sought to obtain judgment against a corporation, the corporation claimed that the persons who had executed the note had done so without authority. The court noted that, in the year between the execution of the note and the commencement of the suit, the corporation had not pursued any legal proceedings to disavow the note but had the benefit of the monies represented by the note. As a result, the court held that, "[w]hen a corporation, with full knowledge of the facts, accepts and retains the benefits of an unauthorized contract, it will be bound thereby." *Kittleson,* 242 Or. 610, 411 P.2d 94.

Similarly, in *Fast v. DeRaeve,* 78 Or.App. 97, 714 P.2d 1077 (1986), we held that the plaintiffs were estopped from enjoining the defendants from flooding their land and from recovering damage for loss of use of their property because the defendants had made improvements based on the flooding. In light of those precedents, we know of no reason why estoppel should not also apply to the legal consequences arising from agreements with a public or governmental body. (FN4) Just as Grant and Jutstrom Fish Company were estopped

from denying the effect of the legal benefits that they had procured, so too is plaintiff estopped from claiming damages when it benefited from the city's approval by refraining from pursuing its rights under ORS chapter 197. Accordingly, the trial court did not err in granting defendants' motion for summary judgment based on the affirmative defense of estoppel.

Affirmed.

FN1. Defendants include the City of Sherwood and the Mayor and city council members of Sherwood at the time preliminary approval was given for William Park, with the exception of Jane Aamold who was not a city council member at that time. Apparently, Aamold became a member afterwards, during the period plaintiff argues that other developers received more favorable treatment.

FN2. James Harris, an engineer retained by plaintiff for the projects, says in his affidavit that Fasano "indicated on several occasion[s] at meetings with City staff and our firm that he was being forced to do something which he felt was unfair and that the City had put him into a situation which required him to go along or lose his project. He indicated he was being forced to go along under duress."

FN3. Apparently, Grant was not the only party seeking the injunction nor the only party later sued by Warren Construction. For ease of explanation in this opinion, we use "Grant" to refer to those parties collectively.

FN4. Other jurisdictions have reached the same conclusion under similar facts. In *Pfeiffer v. City of La Mesa*, 69 Cal.App.3d 74, 78 137 Cal.Rptr. 804, 806 (1977), a property owner sued a city for inverse condemnation after the owner dedicated an easement and constructed a storm drain as conditions imposed for a building permit. The owner alleged that it was compelled by business necessity to accept the invalid conditions. The California court held:

> "[T]he compulsion was of their own making. They signed the lease agreement and unilaterally decided it was to their economic advantage to proceed with the construction to meet its requirements rather than make use of the orderly procedure which has been provided to resolve such controversies. * * * If every owner who disagrees with the conditions of a permit could unilaterally decide to comply with them under protest, do the work, and file an action in inverse condemnation on the theory of economic coercion, complete chaos would result in the administration of this important aspect of municipal affairs.
>
> "It is fundamental that a landowner who accepts a building permit and complies

> with its conditions waives the right to assert the invalidity of the conditions and sue the issuing public entity for the costs of complying with them. * * * By declining to avail themselves of [mandamus] procedures, plaintiffs cannot convert that right into a cause of action in inverse condemnation." 69 Cal.App.3d at 78, 137 Cal.Rptr. 804.

See also Covington Court, Ltd. v. Village of Oak Brook, 77 F.3d 177, 180 (7th Cir.1996) (holding that failure to contest negotiated development conditions bars later taking claim because developer "reaped the benefit of its bargain"); *Trimen Development Co. v. King County*, 65 Wash.App. 692, 702, 829 P.2d 226, 231 (1992) aff'd. on other grounds, 124 Wash.2d 261, 877 P.2d 187 (1994) (concluding that developer's claims were barred by estoppel because the court could not "countenance allowing a developer to reap the advantages of final plat approval obtained without challenge to the approval conditions, and only bring a challenge to those conditions after the municipality has lost any ability to negotiate a solution to the problem other than refund of the fee"); *Schott v. City of Kingman*, 461 F.2d 593, 594 (9th Cir.), *cert den* 409 U.S. 981, 93 S.Ct. 315, 34 L.Ed.2d 245 (1972) (developer cannot obtain compensation for water line easements as condition of

subdivision approval "after having enjoyed the benefits and profits of dedication").

Appendix C

FILED: March 17, 1999

IN THE COURT OF APPEALS OF THE STATE OF OREGON

L.A. DEVELOPMENT, a general partnership consisting of Louis J. Fasano and Arthur and Associates Real Estate, Inc.,

Appellant,

v.

CITY OF SHERWOOD, a municipal corporation, Jane Aamold, Bill Boyle, Barry Kennedy, Mark Cottle and Mayor Walt Hitchcock,

Respondents.

(C960475CV; CA A100395)

Appeal from the Circuit Court, Washington County

Jon B. Lund, Judge

Argued and Submitted Nov. 25, 1998.

William C. Cox argued the cause for appellant. With him on the briefs was Gary P. Shepherd

Timothy J. Sercombe argued the cause for respondents. With him on the briefs was Preston Gates & Ellis LLP.

Before Edmonds, Presiding Judge, and Armstrong, Judge, and Warren, Senior Judge.

EDMUNDS, P.J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing Party. Respondents

[X] Costs allowed, payable by: Appellant

MONEY JUDGMENT

	Judgment #1
Creditor(s):	City of Sherwood: Jane Aamold; Bill Boyle; Barry Kennedy; Mark Cottle; Mayor Walt Hitchcock
Debtor(s):	L.A. Developmdent
Costs:	$184.00
TOTAL AMOUNT:	$184.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment COURT OF APPEALS
Effective Date: August 24, 1999 (seal)